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December 19, 2003

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Verizon Telephone Companies Petition For Reconsideration, "In the Matter of Stale or Moot Docketed Proceedings", CC Docket Nos. 93-193, 94-65, 93-193, and 94-157

Dear Ms. Dortch:

Yesterday, on behalf of Verizon, Ed Shakin and the undersigned met with Christopher Libertelli and Trey Hanbury to discuss the above captioned proceeding. The attached material was discussed.

Please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joseph Mulieri".

Attachments

cc: C. Libertelli
T. Hanbury

Petition for Reconsideration

- **Reinstatement of the terminated proceeding was long after the time for reconsideration and judicial review had expired.**
 - On February 25, 2003, the FCC reinstated the investigation in Docket 94-157 of various issues relating to the treatment of other postretirement employee benefits (“OPEBs”) in the 1993 through 1996 tariffs.
 - The investigation had been terminated in a January 25, 2002 order terminating a number of “stale or moot” proceedings.
 - The deadline for correction of the mistake expired on March 12, 2002, the final date for filing an appeal; the reinstatement order was adopted nearly a year later, on February 25, 2003.

Petition for Reconsideration

- **The Commission cannot “correct” a final order that contains a substantive mistake long after the time for reconsideration and judicial review has expired.**
 - The Commission itself characterized the termination of Docket 95-157 as an “inadvertent technical error.”
 - An agency can correct “clerical mistakes,” like typos, at any time; see FRCP Rule 60(a) “clerical mistakes . . . may be corrected at any time.”
 - But an agency can correct substantive mistakes only while the case is still pending, i.e., within the time for reconsideration or judicial review; see FRCP Rule 60(b) “mistake, inadvertence, surprise, or excusable neglect” may be corrected only within specified time limit.
 - The Commission's error here is well outside the category of clerical errors.

Petition for Reconsideration

- **The Commission itself has recognized and applied this standard to limit its authority in analogous situations.**
- Commission authority to revisit final actions “extends only to the correction of clerical or administrative errors that underlie or occur in the process of taking an action, such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision.” *County of San Mateo, California*, Order on Review and Reconsideration, 16 FCC Rcd. 4291, ¶ 8 (2001). See also, *California Water Service Company*, 18 FCC Rcd. 11609, ¶ 18 (2003).
- The taking of an erroneous action itself, is not generally ministerial error that can be corrected after the 30-day period has elapsed under 47 C.F.R. §1.113(a).” *San Mateo*, ¶ 8.
- **The Commission’s closure of the OPEB investigation was a discretionary action subject to the same limits.** “*We have reviewed* the docket proceedings listed in the appendix, and *have determined* that the dockets should be terminated.” Termination Order, ¶ 1 (emphasis added).

Remaining OPEB Issues

- **If the FCC intends to continue the OPEB investigation, there are only two remaining issues -**
 - **Bell Atlantic's adoption of OPEB accounting in 1991 and 1992**
 - **Reversal of RAO Order excluding OPEB liabilities from the rate base**
- **The 2/25/03 order stated that the FCC would terminate the investigation for any OPEB issues that are not raised in response to the order**
- **No party raised any additional issues**

1993 Access Tariff Filing Direct Case

- **OPEB related costs incurred prior to January 1, 1993 are eligible for exogenous treatment.**
 - Verizon should not be penalized for complying with an approved accounting practice prior to the last date for adoption.
 - Not only did Verizon adopt OPEB within the period authorized by the Bureau's order, but the Bureau specifically noted that "earlier implementation is encouraged." Therefore, adoption of OPEB was "mandatory" regardless of when a carrier implemented it.
 - A cost change resulting from a change in generally accepted accounting practices approved by the Commission is beyond a carrier's "control" and eligible for exogenous treatment regardless of whether a carrier has control over the timing or amount of the underlying costs. (*Southwestern Bell v. FCC*)
 - The Common Carrier Bureau's order approving the OPEB change leaves no doubt on this issue, since it required the carriers to implement the change "on or before January 1, 1993," not "on January 1, 1993" or "no earlier than January 1, 1993."
 - The delay in seeking exogenous treatment until 1993 was due to the Commission's own error in rejecting the previous tariff filings seeking exogenous treatment of OPEB costs (reversed in *Southwestern Bell*).

1993 Access Tariff Filing Direct Case

- No Refunds Would Be Appropriate Even If The Commission Disallowed The Exogenous Cost Adjustments For Pre-Jan. 1, 1993 OPEB Costs
- Verizon's total cost exogenous adjustments for pre-1993 OPEB costs during the 1993-95 tariff period were less than the amount by which Verizon's interstate access rates were below cap.
 - 1993-1994 access rate headroom -- \$45.6 million
 - 1993-1994 OPEB pre-1993 costs -- \$36.8 million
 - 1994-1995 OPEB pre-1993 costs -- \$2.2 million
- Disallowance Of These Costs Would Still Leave Customers With Rates Below Cap During The Two-Year Period For Recovery Of Pre-1993 OPEB Costs

RAO 20 Rescission Order; 1996 Access Tariff Investigation

- Verizon increased its price cap indices for the 1996 access tariff filings by properly adjusting its rate base treatment of OPEBs for prior years.
- As the Court found in *Southwestern Bell*, an agency is obliged to follow its own rules until it changes them after notice and comment, and then only prospectively.
 - RAO 20 wrongfully required the price cap carriers to deduct unfunded OPEB liabilities from the regulated interstate rate base. The effect was to increase the carriers' rates of return and their "sharing" obligations under the old price cap regime.
 - On March 7, 1996, the Commission recognized that RAO 20 was inconsistent with its rules and it rescinded the portion of RAO 20 that had instructed the carriers to deduct unfunded OPEB liabilities from the regulated interstate rate base.
 - Verizon restated its 1993 and 1994 rate base and rates of return, causing a reversal of sharing obligations. It reflected the reversals as exogenous cost increases in its 1996 access tariff filing.
- Any other action by Verizon would have been inconsistent with the Commission's rules in place at the time.



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June 11, 2003

Ex Parte

William Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Verizon Petition for Reconsideration, Reinstatement of CC Docket No. 94-157

Dear Mr. Maher:

As Verizon demonstrated in both its Petition for Reconsideration and its Reply, the Commission's termination of CC Docket No. 94-157¹ was an exercise of judgment or discretion, not a clerical or ministerial action. Even if the judgment was erroneous — that is, even if it was the product of staff neglect, inadvertence, or simple mistake of fact — the error was not the kind of transcription or calculation error that the courts have allowed agencies to correct after an order has become final and non-appealable. *See* Petition for Reconsideration at 10-11; Reply in Support of Petition for Reconsideration at 8-9. In a recent order the Commission has reaffirmed that underlying legal analysis, relying on its own established precedent.

In particular, the Commission has repeatedly held that its authority to revisit final action is confined to transcription or calculation errors and may not be used to correct an error of judgment or discretion. And, as discussed below, the Commission reaffirmed this rule in a unanimous decision by the full Commission just last week.

The leading example of the cases in this line of authority is *County of San Mateo, California*, Memorandum Opinion and Order, 16 FCC Rcd 16501 (2001) ("County of San Mateo"), which involved circumstances parallel to those at issue here. In that case, Champion Communications

¹ *Termination of Stale or Moot Docket Proceedings*, Order, 17 FCC Rcd 1199 (2002) ("*Termination Order*").

Services, Inc. ("Champion") filed an application for a new license to operate on a particular frequency pair in the San Francisco/Oakland area. Several months later, the County of San Mateo filed an application to modify an existing license by adding the same frequency pair within the same area that was the subject of Champion's application. Apparently overlooking the pendency of Champion's prior conflicting application, the Licensing and Technical Analysis Branch of the Public Safety and Private Wireless Division granted San Mateo's requested modification. The Branch later granted a second modification application by San Mateo to add the same frequency pair at another site, likewise within the same area. Champion failed to seek reconsideration of the Branch's actions granting San Mateo's applications, and the grants accordingly became final.

More than five months after it had granted San Mateo's second modification application, the Branch acted *sua sponte* to set aside its grants. It explained that it had just become aware that, in violation of the Commission's rules, it had processed San Mateo's applications ahead of Champion's prior conflicting application. Thereafter, on San Mateo's application for review, the Commission reversed the Branch's set-aside decision, and reinstated the grants of San Mateo's modification applications, on the ground that action taken pursuant to delegated authority may be set aside *sua sponte* only within 30 days. *County of San Mateo, California*, Order on Review and Reconsideration, 16 FCC Rcd 4291, ¶ 8 (2001) ("The Branch was not authorized to rescind its decisions after the respective thirty-day periods had elapsed. Thus, each grant was final thirty days after the date of its grant, and the Branch's . . . rescission is invalid.").

Champion sought reconsideration of the Commission order. It argued, just as WorldCom and AT&T argue here, that the Branch's grant of San Mateo's applications was an "inadvertent error" that the Branch was free to correct even after the time for reconsideration had expired. *County of San Mateo* ¶ 7. The Commission disagreed. It concluded that "the ministerial error doctrine does not extend to the present matter." *Id.* The Commission explained that its "authority to revisit final actions . . . extends only to the correction of clerical or administrative errors that underlie or occur in the process of taking an action, ***such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision.***" *Id.* ¶ 8 (emphasis added). "The taking of an erroneous action, itself, is not generally a ministerial error that can be corrected after the 30-day period has elapsed under 47 C.F.R. § 1.113(a)." *Id.* Because "the decision to grant a license application generally is ***a discretionary, rather than a ministerial, action,***" the Branch was without power to correct its erroneous grant of San Mateo's applications after the reconsideration period had expired. *Id.* ¶ 10 (emphasis added).

The Commission reiterated this fundamental rule in an order released only a few days ago: "The Commission may correct erroneous grants of applications *sua sponte* more than thirty days after they become final only where the grants occur because of, or contain, a ministerial error. The Commission's authority to revisit final actions is limited to the correction of clerical errors that underlie or occur in the process of taking action, such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or

provision.” *California Water Service Company*, Memorandum Opinion and Order, FCC 03-118, FCC File Nos. 0000079079 *et al.*, ¶ 18 (rel. June 3, 2003) (emphasis added; footnotes omitted).²

In contrast, an example of the type of ministerial error that *can* be corrected at any time is *Robert Fetterman d/b/a RF Communications*, 16 FCC Rcd 8221, ¶ 5 (2001). In that instance, the Commission found that the omission of a frequency from a construction permit was a “clerical error” that failed to reflect the Commission’s substantive decision to authorize operation on that frequency, as clearly expressed in a prior Public Notice. *See also Hazle-Tone Communications, Inc.*, 13 FCC Rcd 1547, ¶¶ 10-11 (1997) (correcting “clerical error” in recording on a license a frequency different from the one specified in the Public Notice granting the license application). Similarly, the Commission ruled that it could reimburse parties for overpayments made as a result of the Commission’s mathematical error in calculating the amounts due for broadband PCS licenses. *See APC PCS LLC*, 13 FCC Rcd 23750, ¶ 6 (1998). What these cases have in common — and what distinguishes them from *San Mateo* and *California Water* — is that the errors at issue involved not a mistake of substantive judgment but rather a ministerial transcription or calculation error of the sort that might be made by a clerk or stenographer.

These Commission decisions, together with the additional agency and judicial precedents cited in those orders, strongly support Verizon’s Petition for Reconsideration and refute the arguments on which WorldCom and AT&T have relied in opposing reconsideration. The Commission’s orders make clear that, if the agency has terminated a proceeding in an order that has long since become final and non-appealable, it has no power thereafter to reinstate the proceeding on the theory that the termination was based on a substantive error. Terminating a proceeding, no less than granting a license application, is “a discretionary, rather than a ministerial, action.” *County of San Mateo* ¶ 10. That point is reinforced by the text of the Commission’s *Termination Order* itself, which states in clear terms that “[w]e have reviewed the docket proceedings listed in the appendix, and have determined that the dockets should be terminated.” *Termination Order* ¶ 1. That language confirms that the Commission made a considered judgment, well within the scope of its discretion, to terminate each of the proceedings listed in the appendix, including CC Docket No. 94-157. That judgment may have been the product of a staff mistake or inadvertent oversight, akin to the Branch’s oversight in granting *San Mateo*’s application, but that does not make the judgment a clerical or ministerial error — “such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision,” *County of San Mateo* ¶ 8 — of the sort that the Commission may correct even after the time for reconsideration and appeal has expired.

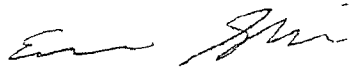
Accordingly, as the Commission’s own precedents dictate, the Bureau must set aside its *Reinstatement Order*.³

² *See also id.* ¶ 22 & n.95 (refusing to revisit a prior ruling because “no entity sought reconsideration,” the “decision is final,” and the ruling was not based on a clerical error “such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision”).

³ *Stale or Moot Docketed Proceedings*, Order, Notice, and Erratum, 18 FCC Rcd 2550 (2003).

William Maher
Chief, Wireline Competition Bureau
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Sincerely,

A handwritten signature in black ink, appearing to read "E. Shakin", with a stylized flourish at the end.

Edward Shakin
Vice President & Associate General Counsel

cc: Sharon Diskin
Laurel Berghold
Debra Weiner
Jeff Carlisle
Joshua Swift
Tamara Preiss
Andrew Mulitz
Aaron Goldsmidt
Chris Libertelli
Matt Brill
Dan Gonzalez
Jessica Rosenworcel
Lisa Zaina